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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON CAI,

Defendant and Appellant.

H038625

(Santa Clara County
Super. Ct. No. CC810427)

This opinion corrects a mathematical error appearing in Parts III.F and IV of the opinion filed May 17, 2016 and vacated on October 26, 2016. The opinion is otherwise unchanged.

I. INTRODUCTION

Xia Zhao, an attorney pursuing a wrongful death action against defendant Jason Cai, was fatally shot on July 1, 2008. Just hours after her death, defendant was arrested and charged with first degree murder. (Pen. Code, § 187.)¹ The complaint alleged that defendant intentionally killed Zhao with a firearm (§ 12022.53, subd. (d)) and by lying-in-wait (§ 190.2, subd. (a)(15)).

A mistrial occurred in 2010, with 11 jurors voting to convict. Represented by new counsel, in 2012 defendant was retried, convicted, and sentenced to life in prison without parole. He challenges his conviction, claiming error in the denial of his suppression motions and certain evidentiary rulings. He raises prosecutorial misconduct and

¹ Unspecified statutory references are to the Penal Code.

cumulative error, and he challenges the lying-in-wait special circumstance verdict. As we will explain, we are not persuaded by defendant's contentions, and we will uphold his conviction.

We will, however, order the sentencing minutes and abstract of judgment modified to correct a math error and to strike a suspended parole revocation fine. We will affirm the judgment as corrected.

II. THE TRIAL

A. THE PROSECUTION'S CASE

Defendant's wife of less than a year, Ying Deng, drowned in defendant's backyard swimming pool in 2003.² In June 2005 Deng's mother, Huidi Shen, represented by attorney Paul Gumina, brought a \$15 million wrongful death lawsuit against defendant. Sometime in June or July 2006, defendant followed Gumina from a courtroom where Gumina was appearing on another matter. Defendant threatened Gumina to drop the wrongful death lawsuit or he "could get messed up." A forensic computer analysis showed that defendant had searched for Paul Gumina on the Santa Clara County court website numerous times between March 2007 and March 2008.

After marrying Deng, defendant purchased a \$250,000 insurance policy on her life, with himself as the beneficiary. In May 2006 defendant submitted a claim for the proceeds of that policy. Gumina also asserted an inheritance claim to the insurance proceeds on Shen's behalf. Defendant persisted in contacting State Farm claims examiner Mia Brack regarding the contested claim, even though she told him she could not speak with him because he was represented by an attorney. In August 2007 defendant denied knowledge of the wrongful death lawsuit to Brack. In September 2007 Brack informed defendant that an interpleader action had been filed, and that State Farm

² In 2006 defendant was prosecuted for Deng's death and acquitted of murder. The jury hung on manslaughter charges, and the prosecutor did not retry the case. As we discuss *infra*, evidence of that prosecution was excluded from the People's case here.

would deposit the insurance proceeds with the court. Defendant became angry and irritated, and he threatened Brack that God would punish her and anyone who had framed him.

Defendant researched three handguns on the internet in September 2007, including the RG Industries .25 caliber model 42—the type of gun used to kill Zhao. Two months later defendant successfully petitioned the trial court in an unrelated proceeding to restore his right to own a firearm, which had been suspended until June 26, 2008. At that hearing defendant denied having researched firearms, and he could not give a reason for wanting his rights restored, other than possibly for hunting, even though he had not previously owned a gun or hunted.

In March 2008 Zhao and another attorney, Parviz Darabi, formally took over the wrongful death case, initiating and aggressively pursuing discovery. Zhao, who had emigrated from China and was fluent in Mandarin, handled all communications with Shen. In January 2008 defendant began searching online for Parviz Darabi, with internet hits occurring eight times between January 7 and June 30, 2008.

Also in January 2008 defendant moved in with his ex-wife and their daughter. According to his mother, defendant was basically homeless and he did not want to work because he did not want to pay Shen should she prevail in the wrongful death lawsuit. Defendant rode a motorcycle, and his ex-wife did not monitor his coming and going.

In March 2008 defendant engaged in target practice at a local gun club. At the same time he began searching for Xia Zhao on his laptop. Over the next few months defendant conducted several searches for Zhao and her law practice, Pacific Crossing Law Office. In late March defendant searched online for both Xia Zhao and Sig Sauer, a firearm.

In April 2008 Shen learned that defendant had sued her in China, seeking to inherit Deng's real property which included Shen's residence at the time. Under Chinese law defendant would not be entitled to the property if he were found to have intentionally

caused Deng's death. Zhao referred Shen to a colleague in China, Hong Chun Chen, and provided Chen with documents concerning Deng's death. Zhao applied for life insurance later that month. She later told Chen that she purchased life insurance because she feared defendant.

On May 6 defendant returned to the gun club for target practice. On May 13 Zhao appeared in court on an unrelated case. She noticed defendant in the courtroom and outside as she was leaving. Zhao approached defendant and asked if he was Jason Cai. Defendant threatened to ruin her career if she continued with the wrongful death case. Zhao took a picture of defendant with her cell phone and called both Darabi and her secretary, Pei Huang. Zhao told Darabi that defendant was right in front of her and had told her to get out of the case. Zhao told Huang that defendant was following her and to call the police. Zhao showed defendant's picture to her husband and her father-in-law so they would recognize defendant if he came to the house, and she reported the incident to the police. Later on May 13, defendant searched the internet for directions to Zhao's office.

A week or two after the May 13 courthouse encounter, defendant was loitering in Zhao's office parking lot when she arrived at work. Zhao told Huang, Darabi, and her husband. That evening Zhao parked a few blocks away from her home because she did not want defendant to know where she lived.

Attorney William Pierce had made a court appearance for Darabi in the wrongful death case. On May 20 and 21 defendant searched an internet people finder service for Pierce. Defendant also accessed Zillow.com three times on May 21 for Pierce's home address. On May 23 defendant searched for directions to Pierce's home address. Sometime in May Pierce discovered an envelope addressed to W. Pierce on the windshield of his car parked at his home. The envelope contained a letter referencing the wrongful death case number, threatening "Don't get involved with Xia Zhao's case."

On May 26 defendant's China-based lawyers argued that defendant was entitled to inherit some of Deng's Chinese real estate, presenting Deng's marriage and death certificates to the Chinese court. Attorney Chen, who appeared on behalf of Shen, provided death investigation documents, identifying them in open court as coming from Zhao. Shen asked that the proceeding be stayed pending the outcome of the wrongful death case, of which defendant's attorneys were apparently unaware.

Between the May 26 hearing and her death on July 1, Zhao spoke with Chen frequently by phone, mentioning her fear of defendant almost every time. She told Chen that she kept seeing defendant following her, and she was afraid it was going to end badly.

On June 3 defendant searched for Zhao online, and he again visited the gun club for target practice. On June 10 and 11 defendant searched online for Zhao and Pacific Crossing Law Office. Two photographs, one of Zhao's parking lot and the other a close up of a car in the lot, were retrieved from defendant's phone, date stamped June 11.

On June 20 a couple living on Hamilton Avenue directly east of Zhao's office encountered defendant lingering in front of their apartment for over 90 minutes. The couple owned video surveillance cameras. Also on June 20, Zhao obtained a temporary restraining order against defendant. That order, served by Federal Express, was left on June 24 at defendant's parents' address (the address on defendant's driver's license). Defendant and his mother denied receiving the order, which required defendant to immediately relinquish any firearms. On June 30 defendant accessed both the restraining order and wrongful death cases on the Santa Clara County court website.

On July 1 at 9:50 a.m. Zhao was shot at close range in the parking lot of her office building. Defendant's daughter told police that afternoon that defendant had left the residence at 8:00 a.m. and returned about 45 minutes later saying he had forgotten something. She heard defendant in his closet, and he left again on his motorcycle minutes later. The neighbors' video surveillance cameras captured a person riding a

motorcycle into the mall parking lot across from Zhao's office at 9:31 a.m., where he lingered for about 5 minutes. Dispatch logs and eyewitness testimony showed an Asian man wearing a fisherman's style hat confronting Zhao in the parking lot around 9:50 a.m. After fatally shooting Zhao in the head and chest, the man fled on foot. At 9:52 a.m., the surveillance camera captured a man running east on Hamilton Avenue away from the parking lot. One of the neighbors identified defendant in court as both the man who had loitered in front of his apartment on June 20 and the man shown running from the crime scene in an enlarged photograph extracted from the 9:52 a.m. video footage. Two times on June 30 the same surveillance camera showed a man walking toward Zhao's office building who resembled the man on the 9:52 a.m. video footage.

Seven people witnessed Zhao in the parking lot struggle for her life. Five described the shooter as Asian,³ and six of the seven described the shooter as wearing a fisherman's style hat—a hat similar if not identical to the one defendant wore daily. One witness identified defendant in court, and another testified that defendant resembled the shooter based on height, weight, body and facial shape, and skin tone. Three others testified that defendant resembled (or was similar to) the shooter.

A criminalist identified 27 out of thousands of possible gun manufacturers in the FBI's database that could have made the gun generating the tool markings on the spent bullets that killed Zhao. One of those manufacturers was RG Industries, and the only RG model that could have produced the tool markings was the RG 42.

On the day of Zhao's murder defendant attended a scheduled court appearance in the wrongful death case, entering a San Jose courtroom around 10:30 a.m. The bailiff observed defendant coughing loudly—the loudest he had ever heard a person cough—for several minutes. The court had held 10 prior hearings in the wrongful death case over a

³ One of those five described the shooter as Asian or Hispanic. The two remaining witnesses did not see the shooter's face

three-year period, and court records showed defendant never having made a personal appearance, although his attorney recalled him making one. His attorney appeared at the July 1 hearing by phone and was unaware defendant would be present.

Following that court appearance, at 12:30 p.m. defendant arrived at the gun club. He returned home where, detached and emotionless, he was arrested at 2:30 p.m. He volunteered to the transport officers that he had been to the shooting range that day and that he was going to beat the case, even though he had not inquired or been informed of the crime for which he had been arrested. The gunshot residue sample tested positive.

The lead investigator interviewed defendant before informing him of the charges against him. Without disclosing the victim's identity, the officer explained that the matter involved an attorney and that defendant had some negative contact with this person in the past. Defendant immediately interjected, “ ‘I never had a negative contact with’ ” ... “ ‘whoever [inaudible] is.’ ”

B. THE DEFENSE CASE

Defendant testified he was home on the computer when Zhao was shot. He disagreed with the forensic computer examiner regarding human activity on his computer the mornings of July 1 and June 30 when the video surveillance had shown a man walking toward Zhao's office. He denied threatening Brack or telling her he was unaware of the wrongful death lawsuit. He denied searching for Darabi online in January. He denied putting the note on Pierce's car or searching online for Pierce before his lawyer told him about the note. He claimed Shen's "lawyers doing this to me," and he was being framed. Defendant admitted attending court to speak with Gumina, but he was friendly and nonthreatening.

Defendant denied attending court on May 13 to see Zhao. That encounter was a coincidence and he did not threaten her. He admitted going to Zhao's office on June 16 about 9:20 a.m. He was reading the newspaper in the parking lot when Zhao approached him, and due to his shock, surprise, and not having his camera ready, he left. He

admitted taking photos in Zhao's parking lot, but only to adjust the zoom. Defendant testified that he went to Zhao's office the day he was observed in front of the neighboring apartment. He had learned from his attorneys that Zhao was seeking a restraining order and he wanted to tell her he did not put the note on Pierce's car. But he was afraid and stayed away from her office until sometime after 5:00 p.m., when he entered the building but no one was there.

Defendant denied being near Zhao's office on June 30, and he denied telling the transport officer he would beat the case. Rather, he said he would win the case because he was innocent. He testified that he wanted his gun rights restored to hunt sharks, and that Zhao and Shen were trying to frame him.

III. DISCUSSION

A. THE TRIAL COURT DID NOT ERR IN UPHOLDING THE SEARCH OF THE GOLDEN GATE DRIVE RESIDENCE

Defendant was arrested at his ex-wife's home on Golden Gate Drive in San Jose on July 1, 2008 shortly after 3:00 p.m. Later that day police executed a search warrant at that residence, seizing defendant's cell phone and three computers. The search warrant sought evidence constituting and related to firearms, clothing, written material tending to identify occupants of the premises, telecommunication equipment, and intermediary communication. The supporting probable cause affidavit noted defendant's arrest for the murder of Deng, the outcome of the Deng murder trial, and the wrongful death lawsuit later initiated by Deng's family. The affidavit identified Zhao as an attorney who had represented Deng's family in that case. It included statements made by Huang and a witness who saw the murder from his window, and the results of a photo line-up shown to another eye-witness. The affidavit noted that defendant had been arrested at the Golden Gate Drive address, but that address was not his address of record and defendant's relationship to the occupants was unknown.

In 2009 defendant moved to quash the Golden Gate Drive search warrant, arguing that the supporting probable cause affidavit intentionally or recklessly misstated or omitted material facts, rendering it incomplete and inaccurate, and that the affidavit did not establish probable cause with the misstated material facts removed and the omitted facts included. Defendant asserted that the good faith exception to the exclusionary rule was inapplicable because the misstatements and omissions were made knowingly or recklessly. He also argued that the affidavit lacked probable cause to search the computers and cell phone because it acknowledged that the Golden Gate Drive address was not defendant's address of record and that defendant's relationship to the occupants was unknown, and it failed to show that the computers and cell phone contained evidence of Zhao's murder.

The prosecution conceded that the affidavit lacked probable cause to search the computers for evidence relevant to Zhao's murder because the affidavit did not establish defendant's relationship to the residence. But the prosecutor argued that the affidavit provided probable cause to seize the computers and cell phone to search for evidence of dominion and control, and that the lawfulness of that seizure, not the scope of the computer searches performed under the authority of the dominion and control clause, was before the court. Defendant countered that any search exceeding the dominion and control clause would be beyond the scope of the warrant, but he did not identify any specific evidence obtained from the computers or phone that in his view should be suppressed as exceeding that scope. The prosecution proffered a modified warrant accounting for the omissions and misstatements identified by defendant, and argued that even defendant's version of the relevant facts established probable cause to search the residence.

In a September 15, 2009 order upholding the warrant, the trial court found: (1) the misstatements and omissions were not material to the probable cause finding; (2) a modified affidavit with the misstatements omitted and the omitted facts added still

established probable cause to search the residence; (3) the seizure of the computers and cell phone properly fell within the warrant's dominion and control clause; and (4) the good faith exception applied because any defects in the affidavit were not intentional or reckless. Shortly after that ruling, police obtained a warrant to search the seized cell phone and computers for evidence linking defendant to Zhao's murder. The prosecution obtained a forensic analysis of the phone and computers under the authority of the new 2009 warrant, even though the devices had previously been analyzed.

Before the 2012 retrial, defendant moved to suppress all evidence derived from the Golden Gate Drive search warrant, reasserting the argument he made in 2009 that the supporting probable cause affidavit misstated and omitted material facts. Defendant also challenged the Golden Gate Drive warrant on new grounds. He argued that it was facially deficient, overbroad, and lacked probable cause based on an insufficient nexus between Zhao's murder and the residence, and he characterized the 2009 warrant as a "backdoor attempt to cure the fatal overbreadth and lack of particularity of the initial search warrant." Defendant also challenged a warrantless protective sweep of the residence undertaken at the time of defendant's arrest.

In opposing the 2012 motion, the prosecutor explained that the judge who considered the first suppression motion "may very well have found ... that the forensic work that was done prior to the addition of the second search warrant fell within a search to establish dominion and control. But [defendant] never made that argument, and to prevent that argument from being made in the future, we got a second search warrant and it was well known to [defendant] why we were getting the second search warrant. And he never challenged any of the work that was performed under that second search warrant." The trial court denied defendant's second suppression motion as untimely and falling outside section 1538.5, subdivision (h). The court alternatively denied the motion on the merits, upholding the validity of both warrants.

On appeal, defendant argues that the trial court erred by denying both motions to suppress the Golden Gate Drive warrant because (1) the affidavit contained material misstatements and factual omission, and had the affidavit been truthful and complete it would have lacked probable cause; (2) no probable cause existed to seize the cell phone and computers; and (3) the warrant was overbroad.

“When an appellate court reviews the validity of a search warrant, ‘the magistrate’s determination will not be overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause. [Citations.] Doubtful or marginal cases are resolved in favor of upholding the warrant. [Citations.] The burden is on [the defendant] to establish invalidity of [a] search warrant[].’ ” (*People v. Garcia* (2003) 111 Cal.App.4th 715, 720.) “The magistrate’s determination of probable cause is entitled to deferential review.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1041.)

“Probable cause to search exists when, based upon the totality of the circumstances described in the affidavit, ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’ ” (*People v. Farley* (2009) 46 Cal.4th 1053, 1098, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 238.) “A ‘practical, nontechnical’ probability that incriminating evidence is involved is all that is required.” (*Texas v. Brown* (1983) 460 U.S. 730, 742.)

1. Misstatements and Omissions

A criminal defendant may challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. (*Franks v. Delaware* (1978) 438 U.S. 154, 155 (*Franks*).) Under the Fourth Amendment to the United States Constitution, when a defendant makes a substantial preliminary showing that the affidavit contains intentionally or recklessly false statements, the warrant is reexamined for probable cause with the alleged false statements excised. (*Id.* pp. 171–172.) If the false statements are deemed material—meaning they are necessary to the probable cause finding—the Fourth Amendment entitles the defendant to an evidentiary hearing to establish perjury or

reckless falsehood. (*Id.* at pp. 169, 171–172.) If the defendant prevails at that hearing, the search warrant is voided and the fruits of the search suppressed. (*Id.* at pp. 155–156.)

If a warrant is challenged based on omissions from the supporting affidavit, the defendant bears the burden of showing the omissions were material to the probable cause determination. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297.) “ ‘[M]ateriality is evaluated by the test of *Illinois v. Gates* (1983) 462 U.S. 213, ... which looks to the totality of the circumstances in determining whether a warrant affidavit establishes good cause for a search.’ ” (*Ibid.*)

Defendant identifies the following misstatements and omissions in the affidavit. First, the affiant misrepresented the outcome of the 2006 murder trial by stating that defendant had been tried for Deng’s murder and the jury failed to reach a verdict. According to defendant, the affidavit should have stated that defendant was acquitted of first and second degree murder and the jury hung only on manslaughter. Second, the affiant stated that the wrongful death action was filed in 2008 instead of 2005. Third, the affiant incorrectly described Huang as saying that Zhao was followed from a court appearance and threatened by defendant, after which she ran back to the courthouse to call the police. Huang actually reported that Zhao had called her and asked her to call the police. Huang did not report that defendant followed Zhao but that Zhao confronted defendant when he was sitting under a tree and that she approached him and asked him if he was Jason Cai. In terms of the actual threat, the affiant failed to acknowledge that the only specific words Huang recalled defendant telling Zhao were that Zhao was going to “ ‘ruin her career.’ ” Last, the affidavit accurately stated that one witness (Owens) had identified defendant and another man from a photo lineup as most similar to the shooter. But the affidavit omitted that witness’s description of the shooter as appearing younger than defendant with a moustache, and his claim that he could identify the shooter if he saw him again. The affidavit also omitted the statement of another witness (Olsen) that a

different man in the photo lineup was closest in appearance to the shooter, and that the shooter appeared younger than the men in the photos.

According to defendant, those omissions and misstatements were intentional or at least reckless because the affiant selectively included numerous facts that incriminated defendant while omitting facts that weakened the probable cause statement. Defendant argues that a corrected affidavit would have shown that defendant was acquitted of murdering Deng, that defendant may not have liked Zhao because of the pending lawsuit but had no strong or urgent motive to kill her, that Zhao's May 13 encounter with defendant did not involve physical violence or overt threats, and that two witnesses could not identify defendant in the photo lineup. One of those witnesses said he would be able to identify the shooter, who he described as wearing a mustache, if he saw him again, and both thought the shooter appeared to be younger than defendant.

In our view, defendant failed to make a preliminary showing of deliberate falsehood or intentional or reckless disregard for the truth. To meet his burden, defendant must support his allegations with an offer of proof, which should include an affidavit or otherwise reliable witness statement, or an explanation for the absence of such proof. (*Franks, supra*, 438 U.S. at p. 171.) Defendant's contention that the affiant selectively chose facts to include in the affidavit is not supported by the record. Defendant proffered no witness statements or interview transcripts of witnesses interviewed before the search warrant was authorized. Witnesses Huang and Zhao's husband had detailed knowledge of Zhao's fear of defendant, including the restraining order application, which was not fully reflected in the probable case affidavit. Defendant failed to show that Olsen was even interviewed before the affidavit was signed. The affidavit, which was not time-stamped, acknowledged, "This is an on-going investigation. Several witnesses still need to be interviewed." While Owens was shown the photo lineup at 12:10 p.m. on July 1, Olsen was not shown the lineup until 3:55 p.m. The information in the affidavit, obtained immediately after Zhao's killing and defendant's arrest, was substantially accurate and

does not demonstrate an intent to mislead the reviewing magistrate. (*Bradford, supra*, 15 Cal.4th at p. 1298, see also *United States v. Ventresca* (1965) 380 U.S. 102, 108–109.)

Even if the probable cause affidavit were modified to eliminate the defects alleged by defendant, the resulting affidavit still supports issuance of a search warrant. Such a modified affidavit proffered by the prosecution established a fair probability that evidence that defendant committed Zhao’s murder would be found at the residence where defendant was arrested. The modified affidavit showed defendant had been charged with Deng’s 2003 murder, that the case was dismissed after the jury acquitted on murder but hung on manslaughter, and that Zhao had been representing Deng’s family in a wrongful death action against defendant. According to Zhao’s secretary, Zhao had encountered defendant twice within six weeks of her death. On May 13 Zhao saw defendant in court and assumed he was evaluating her performance. She saw him again as she was walking from court to her car, approached him, asked him if he was Jason Cai, and took his picture. He threatened her, saying “you are going to ruin your career” and “you had better, you know, [sic] off this case.” Huang also reported that about two weeks before the murder, defendant was in the parking lot of Zhao’s office building just looking around when Zhao arrived at work at her usual time between 9:45 a.m. and 10:00 a.m.

The modified affidavit showed that Zhao was hired by Deng’s family to prove that defendant had killed Deng, she had recent disturbing encounters with defendant, one involving a threat prompting an immediate phone call to her secretary to report the encounter to the police. From the apartment building next to Zhao’s office, Tucker heard screams and saw a man with a gun chase Zhao and shoot her. Owens, who also witnessed the shooting from his apartment, described the assailant as an Asian male in his late 20s to mid 30s, and he identified defendant in a photo lineup as one of two persons most similar to the shooter. Olsen, who worked in the same building as Zhao, was drawn to the parking lot by loud screams and witnessed Zhao being shot. She told police she

did not get a clear view of the shooter because of his position and clothing and her focus on the gun.

Owens witnessed the shooting from some distance, and Olsen did not get a clear view of the shooter. Thus, neither Olsen's inability to identify defendant as the shooter, nor Owens' inability to definitively identify defendant as the shooter, nor his description of the shooter as being in his 20s or 30s with a thin mustache, undermines the probable cause established by a corrected affidavit. Nor is probable cause undermined by defendant's acquittal in Deng's murder trial or the wrongful death action's 2005 filing date.

2. Probable Cause to Seize the Computers and Cell Phone

Among the list of "property, things, and evidence" at the Golden Gate Drive residence subject to lawful seizure, the warrant identified "Personal address books, diaries, or other written materials which tend to identify the occupants of the dwelling and family, friends, and associates." In a separate category, it identified "intermediary communication," including computer entries which "appear to contain, reference, or request information concerning persons and/or events relating to" Zhao's murder. Defendant argues that the affidavit does not support seizure of the computers and cell phone because it failed to state why and how a search of computers and a phone at a home with an unknown connection to defendant might provide evidence of murder. He also argues that the warrant did not authorize seizure of the computers and phone to establish residential dominion and control.

Dominion and control clauses are standard features in search warrant practice identifying individuals who own or occupy a home. (*People v. Balint* (2006) 138 Cal.App.4th 200, 206 (*Balint*).) Evidence identifying those in control of premises can link a person to inculpatory evidence found on the property. (*Ibid.*) The dominion and control clause in *Balint* authorized seizure of "[a]ny items tending to show dominion and control of the location, including" items such as delivered mail, phone bills, rent

receipts, phone messages, and photographs. (*Id.* at p. 204, fn. 1.) The court interpreted the clause broadly as a non-exclusive list of examples likely to show dominion and control of the residence. (*Id.* at p. 207.) *Balint* embraced the Colorado Supreme Court’s analysis in *People v. Gall* (Colo. 2001) 30 P.3d 145, 154, that “laptop computers were reasonably likely to serve as containers for writings, or the functional equivalent of ‘written or printed material’ of a type enumerated in the warrant,” to conclude the dominion and control clause encompassed a laptop computer on the family room sofa. (*Balint*, at pp. 204, 209.) Adopting the reasoning in *Balint*, *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1101, concluded that a computer not specifically mentioned in a warrant may be seized under a general dominion and control clause.

Guided by *Balint* and *Varghese*, we conclude that the computers and cell phone were lawfully seized under the 2008 warrant’s dominion and control clause. Defendant did not raise, nor did the trial court address, whether any specific information obtained from the initial forensic examinations of those items exceeded the scope of the dominion and control clause. Police obtained a second warrant in 2009. That warrant, used to support a second forensic examination, avoided the prosecutor having to litigate whether the initial forensic examination fell within the scope of the dominion and control clause. Except to buttress his overbreadth claim, defendant has not challenged the 2009 warrant, and its validity is not before us.

3. Overbreadth

a. Forfeiture

Defendant argues that the Golden Gate Drive warrant was overbroad and lacked particularity. He has forfeited that claim by failing to raise it in his first suppression motion. “As a general rule, a defendant is allowed only one pretrial suppression motion under [Penal Code] section 1538.5 in the superior court, and that court is without jurisdiction to hear a second motion.” (*People v. Nelson* (1981) 126 Cal.App.3d 978, 981.) Indeed, a defendant cannot renew a suppression motion before a second trial when

the first trial resulted in a mistrial. (*People v. Williams* (1979) 93 Cal.App.3d 40, 60 (*Williams*)). This means a defendant must raise all available suppression grounds in his or her initial pretrial motion. (*Nelson, supra*, 126 Cal.App.3d at p. 981; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640 (*Lorenzana*)). An exception exists only when “opportunity for [a second] motion did not exist or the defendant was not aware of the grounds for the motion.” (§ 1538.5, subd. (h).)

Williams addressed whether a defendant could renew a suppression motion before a retrial, and *Lorenzana* rejected a prosecutor’s request to remand a suppression matter to the trial court for a hearing to argue a new theory of admissibility, explaining: “To allow a reopening of the question on the basis of new legal theories to support or contest the admissibility of the evidence would defeat the purpose of Penal Code section 1538.5 and discourage parties from presenting all arguments relative to the question when the issue of admissibility of evidence is initially raised.” (*Lorenzana, supra*, 9 Cal.3d at pp. 640–641.) Here, defendant sought to reopen the 2009 suppression ruling by filing a new suppression motion in 2012. Under section 1538.5, interpreted by *Lorenzana* and *Williams*, that motion was untimely. Defendant had the opportunity to facially challenge the Golden Gate Drive search warrant in 2009 before his first trial. He failed to do so and therefore forfeited his claim.

b. Ineffective assistance of counsel

Defendant argues that any forfeiture of his overbreadth claim is attributable to ineffective assistance of trial counsel. Ineffective assistance of counsel requires a showing that counsel’s performance fell below an objective standard of reasonableness and defendant was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) “When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and

failed to provide one, or unless there simply could be no satisfactory explanation’ [citation], the case is affirmed [citation].” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) Prejudice requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland*, at p. 694.) A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

Defendant’s ineffectiveness claim fails because there could be a satisfactory explanation for why, in 2009, counsel failed to press an overbreadth challenge in the trial court: Counsel could have been of the reasonable view that defendant would not prevail on that claim. The warrant referenced “Proof, by affidavit, having been made” to the court, and the supporting affidavit described Zhao’s murder and set forth probable cause to seize evidence of the murder at the residence where defendant was arrested. The warrant described evidence connected to the murder with sufficient particularity. (§ 1525.) It specifically sought firearms and ammunition, evidence to identify occupants of the home, biological materials, specific items of clothing, telecommunication equipment, and intermediary communications referencing the murder. Even if the warrant were overbroad for including a clause directed at gambling debts, loan sharking, and money laundering,⁴ or for adding “family, friends, and associates” to the dominion and control clause, those provisions are severable from the warrant and do not affect the authority under the dominion and control clause to seize the computers and cell phone. (*Aday v. Superior Court of Alameda County* (1961) 55 Cal.2d 789, 797.) Severance of the allegedly overbroad provisions would be appropriate because they are minor and would not infect an otherwise particular and lawful warrant. (*Ibid.*; *U.S. v. SDI Future*

⁴ As the trial court noted, the clause referencing gambling debts, loan sharking, and money laundering was likely the remnant of an unrelated warrant and defendant points to no items that were seized under that provision.

Health, Inc. (9th Cir. 2009) 568 F.3d 684, 707 [disapproving severance “ ‘when the valid portion of the warrant is a relatively insignificant part of an otherwise invalid search.’ ”].)

For the same reasons, defendant has failed to show a reasonable probability that he would have prevailed had he timely pressed that claim.

4. Good Faith Exception to the Exclusionary Rule

Even if the Golden Gate Drive search warrant were lacking in probable cause, which we conclude is not the case here, the good faith exception to the exclusionary rule would apply. (*United States v. Leon* (1984) 468 U.S. 897, 920 [“when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope,” the exclusionary rule does not apply].) As we have explained, the court’s probable cause determination was not based on an affidavit containing knowing or reckless falsity. Nor was the affidavit facially deficient or “ ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” (*Id.* at p. 923.)

B. EVIDENTIARY ISSUES

Evidence Code section 210 defines relevant evidence as evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” Evidence Code section 352 provides trial courts with discretion to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” The trial court is vested with wide discretion to determine relevance and weigh the prejudicial effect of proffered evidence against its probative value (*People v. Edwards* (1991) 54 Cal.3d 787, 817), including third party culpability evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 372–373.) On appeal, its ruling will not be disturbed absent an abuse of that discretion. (*Ibid.*; *People v. Valdez* (2004) 32 Cal.4th 73, 108 [impeachment evidence].) We will uphold the evidentiary ruling unless “the trial court

exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) Abuse of discretion occurs when “ ‘the court exceeds the bounds of reason, all of the circumstances being considered’ ” (*People v. Adams* (2004) 115 Cal.App.4th 243, 252–253), or when it misapplies the law. (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 663.) A due process violation results when evidentiary error makes the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*).)

1. Defendant’s Statement to Shen About Killing in the United States

Shen testified to meeting defendant in China in April 2003, before her daughter moved to the United States and married defendant. During a family conversation about United States law, defendant said “It’s very easy to kill someone in the United States. There are judicial loopholes that you can find.” The court overruled defendant’s relevancy objection to Shen’s statement. On appeal, defendant argues that the trial court erred by admitting Shen’s testimony, as it was irrelevant, unduly prejudicial, and violated due process.

“ ‘The theory upon which evidence of circumstances is admitted ... is not that each circumstance stands flawless in its proof of the ultimate fact, but that each certain circumstance has a relation to and points reasonably to the fact sought to be proved.’ ” (*People v. Manson* (1976) 61 Cal.App.3d 102, 153.) Evidence that defendant considered the criminal justice system to contain loopholes sufficient to evade legal responsibility for murder was relevant to defendant’s state of mind. (*People v. Anderson* (1968) 70 Cal.2d 15, 26 [premeditation and deliberation are elements of first degree murder].) Defendant’s loophole statement is relevant to show that defendant acted with premeditation and deliberation to commit murder and get away with it by obtaining information about Zhao online, stalking Zhao and casing her office building, and by contemplating computer, courtroom, and shooting range alibis. The court’s relevancy ruling was not an abuse of discretion.

To the extent defendant challenges Shen's testimony as unduly prejudicial and violating due process, he has forfeited those claims by failing to object below. A defendant "may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial." (*Partida, supra*, 37 Cal.4th at p. 435; see also Evid. Code, § 353; *People v. Demetrulias* (2006) 39 Cal.4th 1, 21 ["a relevance objection does not, in itself, alert the trial court to the claim that the testimony objected to is inadmissible" on other grounds].)

2. Defendant's Firearms Reinstatement Petition

While in custody following Deng's death, a mental health hold was placed on defendant, and that hold resulted in defendant losing his right to own or possess a firearm for five years, until June 2008. (Welf. & Inst. Code, § 8103, subd. (f)(1).) In November 2007, defendant petitioned the superior court to have his firearm rights restored. (*Id.*, § subd. (f)(5).) Defendant moved in limine to exclude evidence of the reinstatement petition, arguing that his mental health status in 2003 and the results of the 2007 reinstatement proceeding were irrelevant, and that the evidence would confuse and mislead the jury. When the court heard the motion, defendant conceded relevancy and pressed for exclusion based on the confidentiality of the 2007 proceeding. Preserving his objections, defendant agreed to the deputy district attorney who appeared at the 2007 reinstatement hearing reading selected transcript passages, with the following advisement to the jury: "[T]he defendant, Mr. Cai, was unable to own or purchase a firearm until June 26, 2008. After that date, the defendant could own and/or purchase a firearm without Court approval. [¶] On November 30, 2007, the defendant's petition to enable him to own or purchase a firearm before June 26th, 2008, was heard by the Superior Court. You are not to speculate why the defendant was unable to own or purchase a firearm until June 26th, 2008. And you are advised that this inability was not related to any wrongdoing by the defendant."

The deputy district attorney testified that at the 2007 hearing defendant answered the question “Why do you want firearms?” with “That’s kind of difficult to say at this point, but I’m just interested to get one.” To the follow-up question “Can you tell me why?” defendant responded “I have no – no particular reason,” and “Just my rights as a citizen.” When asked what kind of firearm he wanted, defendant said “I don’t know yet. I just want my rights back so I can learn some -- get some training and --.” Defendant denied having researched firearms. The judge asked defendant what he would do with a gun if his petition were granted. Defendant responded “I don’t know yet. Well, basically, I have a lot of free time so I may go hunting. I like fishing, but maybe go hunting with some friends.” The judge asked “Hunting for what?” and defendant said “I don’t know.” Defendant acknowledged that he had never hunted because he never had a gun. The judge granted the petition.

Over defendant’s Evidence Code section 352 objection, the same deputy district attorney also testified that defendant declined his suggestion to wait until June 2008, when his rights would be automatically restored, in lieu of proceeding with the reinstatement hearing.

Defendant argues that the firearms petition evidence was more prejudicial than probative and violated due process. He presses that he was unaware that Zhao was handling the wrongful death case in 2007 when his petition was heard, and that Zhao was not killed with the gun that defendant had legally purchased after his rights were restored. He argues that he was prejudiced on cross-examination because the prosecution invited the jury to draw a negative inference from his Second Amendment right to bear arms.

The trial court did not abuse its discretion in allowing evidence of the 2007 reinstatement proceeding. Nor did this evidence render defendant’s trial fundamentally unfair. The evidence was probative of defendant’s premeditation and deliberation, and not confusing, misleading or unduly prejudicial. (*People v. Karis* (1988) 46 Cal.3d 612, 638 [distinguishing undue prejudice from prejudice that naturally flows from relevant,

highly probative evidence].) The evidence showed that defendant was contemplating harm to those who were prosecuting the wrongful death case and preventing him from collecting Deng's life insurance proceeds. The evidence also showed that defendant had no experience with or apparent interest in guns his entire life but that interest became compelling in late 2007 as Shen's attorneys persisted with the wrongful death lawsuit. The right to bear arms is not absolute (*District of Columbia v. Heller* (2008) 554 U.S. 570, 626–627), and probing defendant's reasons for wanting his rights restored did not infringe on his rights under the Second Amendment.

3. Third Party Culpability and Failure to Investigate Other Suspects

Defendant argues that the trial court violated his due process and confrontation rights by not allowing him to cross examine Zhao's husband and police about a Chinese dissident who may have wanted to harm Zhao—Ming Peng—or present evidence of Peng's motive and ability to kill Zhao. In limine, defendant proffered the following: After telling police why he thought defendant killed Zhao, Zhao's husband told police that Zhao won a \$150,000 defamation judgment in absentia against Peng shortly after Peng's arrest and imprisonment by Chinese officials. After winning the case, Zhao was politely visited by someone associated with Peng who warned her not to pursue the judgment. Zhao thought that person had ties to criminal activity. Her client, also a Chinese dissident, told her not to pursue the judgment and, according to Zhao's husband, Zhao dropped the matter. About a month before Zhao died, her client consulted her about the judgment, but Zhao's husband was unaware of any action taken by Zhao in response to that contact. Peng was in prison in China when Zhao was murdered.

Defendant proffered court documents showing the \$150,000 defamation judgment entered in November 2004, and a December 2004 judgment lien notice by Zhao for reimbursement of \$61,485 in legal fees. In June 2007 Zhao filed a memorandum of costs after judgment declaring \$38,015 in accrued interest, and in August 2007 she notified the court of her new business address. The parties had portions of Zhao's case file, which

apparently showed that Zhao had entered an agreement with another attorney in May 2007 to locate assets to satisfy the Peng judgment, and that inquiries into Peng's assets were made in 2007 and early 2008. Finally, defendant presented a declaration by Zhao's client that Peng was a violent man (although Peng had never threatened the plaintiff over the defamation suit) and evidence of a 2003 third-party restraining order against Peng. The court granted the prosecution's opposed motion to exclude third party culpability evidence, concluding there was insufficient evidence to link a third person to Zhao's death or to show an inappropriate or insufficient police investigation.

The court did not abuse its discretion excluding third party culpability evidence because defendant failed to proffer evidence linking Peng to Zhao's murder, and no constitutional error occurred. "A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does 'not require that any evidence, however remote, must be admitted to show a third party's possible culpability. ... [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' " (*People v. Sandoval* (1992) 4 Cal.4th 155, 176, quoting *People v. Hall* (1986) 41 Cal.3d 826, 833.)

Chinese officials took Peng prisoner in 2004, and he was still imprisoned when Zhao was murdered. Although Zhao had been contacted by someone presumably on Peng's behalf shortly after winning the defamation judgment, she had no contact with Peng or anyone associated with Peng again. Court records showed that the June 2007 declaration of accrued interest was not served on Peng. Indeed, defendant provided no evidence that Peng was aware of the accrued interest, Zhao's asset checks, or her engaging a colleague to collect the judgment. On this record, defendant's third party culpability theory was speculative. Defendant's proffered evidence did not link Peng to Zhao's murder, and it was incapable of raising a reasonable doubt as to defendant's guilt.

Nor does the evidence establish an inadequate or compromised police investigation. (*People v. Page* (2008) 44 Cal.4th 1, 37 [“The possibility the police may have chosen not to follow up more thoroughly on all leads does not impeach the evidence against defendant.”].)

Defendant argues that the prosecution opened the door “to evidence of the quality of the [police] investigation” when the investigating officer testified that he identified defendant as a suspect after speaking with Zhao’s husband and that he eliminated certain motives for the murder. The investigating officer testified that he eliminated carjacking, robbery, and sexual assault as motives for the murder at the crime scene, and he ruled out domestic violence after speaking with Zhao’s husband. He testified that he identified defendant as a suspect through the course of his investigation, and he sought an arrest warrant after interviewing witness Owens and speaking with Zhao’s husband.

The prosecution did not open the door to third party culpability evidence directly or indirectly by challenging the completeness of the police investigation. Eliciting testimony regarding the state of the crime scene and the accused killer’s motive does not implicate third party culpability.

C. ASSERTED PROSECUTORIAL MISCONDUCT

A prosecutor commits misconduct by using “ ‘deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” (*People v. Lopez* (2013) 56 Cal.4th 1028, 1072.) Misconduct under state law is reviewed for harmless error: Whether it is reasonably probable that without misconduct an outcome more favorable to the defendant would have resulted. (*People v. Riggs* (2008) 44 Cal.4th 248, 298 (*Riggs*), citing *People v. Strickland* (1974) 11 Cal.3d 946, 955.) “When defendant’s objections are sustained and the court admonishes the jury to disregard [a prosecutor’s] improper comments, we assume the jury will follow the admonishment and any prejudice is avoided.” (*People v. Mendoza* (2007) 42 Cal.4th 686, 702.)

“Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation,” is reversible error only when the challenged action “ ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ” (Riggs, *supra*, 44 Cal.4th 248, 298, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Cash* (2002) 28 Cal.4th 703, 733.)

1. Deng’s Murder Trial

Defendant moved in limine to exclude “the prior criminal action against [defendant] in its entirety.” The court excluded evidence of defendant’s criminal prosecution for Deng’s death, but not of the civil wrongful death action. The court cautioned that it did not want witnesses testifying about events that took place “ ‘during the murder trial.’ ” The prosecutor responded: “[I]t seems to me, at a minimum, the jury will be told there was a police investigation in 2003,” and he did not think the jury could be insulated from the fact that there was an investigation of defendant. The court responded: “I don’t see any danger or prejudice right now to the fact that there was an investigation. I think the jury would expect that a person found drowned under a pool cover would prompt a police investigation into the circumstances of her death”

During cross-examination, the prosecutor asked defendant whether he was trying to create a computer alibi for Zhao’s murder. After defendant agreed, the prosecutor asked: “And, in fact, sir, you ran the same defense when investigators looked at what you were doing at the time Ying Deng drowned in the family pool; correct?” The court sustained defendant’s objection to that question. The prosecutor asked defendant whether he remembered the police coming to his home when his wife was dead in the pool. The court overruled defendant’s objection that the question probed excluded matters.

Outside the jury’s presence, the court clarified that evidence that defendant was the target of the Deng death investigation was excluded. Defendant sought a mistrial,

arguing the prosecutor's "you ran the same defense" question poisoned the case and disregarded the court's earlier ruling. The court denied the motion, explaining that it had sustained defendant's objection to that question, and it had instructed and would reinstruct the jury that counsel's questions are not evidence. The court told the prosecutor that the phrase "you ran the same defense" implied defendant's position was not true, which was inappropriate because it was inconsistent with defendant's acquittal. The court clarified: "I guess the simple answer is: You don't get to present it as a claim or contention or a defense." The court suggested that the prosecutor ask defendant what he told police about using the computer when Deng died. Defendant unsuccessfully renewed his mistrial motion after the prosecutor explained that he did not think defendant told the police about the computer; rather, it was something that surfaced at the Deng trial.

Defendant argues on appeal that the prosecutor committed misconduct by questioning him about his defense in Deng's murder case in disregard of the in limine ruling. But the objectionable question, which followed a colloquy regarding defendant's defense to Zhao's murder, referenced the investigation at the time of Deng's death, not defendant's criminal trial. We will not infer that the jury understood the prosecutor's question, which was not evidence, to mean that defendant was criminally prosecuted for Deng's death. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1192.) Even if the prosecutor's question suggested defendant was the target of that investigation, the prosecutor did not commit misconduct. The court did not articulate its ruling—distinguishing the target of the investigation from the investigation itself—until after the prosecutor asked the "you ran the same defense" question. The question was not deceptive or reprehensible, and we find no deliberate attempt to seek inadmissible testimony. (*People v. Bell* (1989) 49 Cal.3d 502, 532 [" 'The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct.' "].) Nor did the question render the trial fundamentally unfair. The court sustained defendant's

objection and instructed the jury more than once that counsel's questions are not evidence. The jury is presumed to have followed that instruction. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

2. Argumentative Cross-Examination

Defendant argues that the prosecutor's argumentative cross-examination constituted misconduct. In particular, defendant contends that the prosecutor repeatedly asked defendant whether prosecution witnesses had lied in their testimony. *People v. Chatman* (2006) 38 Cal.4th 344 (*Chatman*) provides a useful discussion of the permissible scope of cross-examination where, as here, the defendant testifies to a set of facts contrary to other witness testimony. In *Chatman*, three prosecution witnesses recounted the defendant bragging about details of a murder. (*Id.* at pp. 355–356.) The prosecutor asked the defendant whether those witnesses were lying. The defendant answered yes, but denied ever telling one witness about the murder, claimed another misperceived his recount as bragging, and had no explanation for why the third witness would lie. (*Id.* at pp. 378–379.) *Chatman* found the prosecutor's questions appropriate to properly assist the jury in ascertaining whom to believe. (*Id.* at p. 383.)

The *Chatman* court distinguished the lay opinions of witnesses with no personal factual knowledge from opinions of percipient witnesses having personal knowledge. (*Chatman, supra*, 38 Cal.4th at p. 381.) *Chatman* reasoned that questions regarding a witness's credibility—"were they lying" questions—are appropriate when the defendant has personal knowledge of an event to give a reason why his or her testimony is more reliable than another witness's testimony. (*Id.* at p. 382.) The court elaborated: "There is no reason to categorically exclude all such questions. Were a defendant to testify on direct examination that a witness against him lied, and go on to give reasons for this deception, surely that testimony would not be excluded merely because credibility determinations fall squarely within the jury's province. Similarly, cross-examination along this line should not be categorically prohibited." (*Ibid.*)

Chatman described argumentative questions as those not eliciting relevant testimony, where counsel “talks past the witness, and makes an argument to the jury[.]” (*Chatman, supra*, 38 Cal.4th at p. 384.) *Chatman* concluded that questions about lying should not be permitted when argumentative, or to elicit irrelevant or speculative testimony. However, in its discretion, the trial court “may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions.” (*Id.* at p. 384.)

We conclude that the court did not abuse its discretion in allowing the prosecution to question defendant about the testimony of Brack, Gumina, and Jommaung. Each testified to a conversation he or she had with defendant. The prosecutor’s questions elicited defendant’s position on those conversations and ultimately assisted the jury in resolving key credibility determinations. Similarly, defendant had personal knowledge of his May 13 encounter with Zhao and he could assist the jury’s determination as to whether he or Huang was testifying reliably as to that event. Defendant also had personal knowledge of his computer searches, his post-arrest conversations with police, and the July 1 case management conference in the wrongful death case. It was also proper for the prosecutor to ask defendant what he thought had happened to his hats, particularly the fisherman-style hat which the prosecution believed defendant had worn when he killed Zhao.

The prosecutor has wide latitude to cross-examine a defendant about his veracity. (*Chatman, supra*, 38 Cal.4th at p. 382.) As in *Chatman*, defendant took the stand and put his veracity in issue. He “was not asked to opine on whether other witnesses should be believed,” but “to clarify his own position and whether he had any information about whether other witnesses had a bias, interest, or motive to be untruthful.” (*Id.* at p. 383.) The trial court’s evidentiary rulings allowing what defendant perceived to be

argumentative questions were not an abuse of discretion, and the prosecutor committed no misconduct.

D. CUMULATIVE ERROR

Defendant argues that cumulative error infected the trial with such unfairness as to render his conviction a denial of due process. We find no error, but even if error were present, it would be harmless under *People v. Watson* (1956) 46 Cal.2d 818, and, assuming an enumerated constitutional right were implicated, *Chapman v. California* (1967) 386 U.S. 18. Nor would such error result in any due process violation, because defendant was not deprived of a fair trial. The record is replete with evidence showing defendant planned Zhao's murder, stalked her, and killed her. Defendant tracked Gumina, Darabi, Pierce, and Zhao online. He threatened all of them, as well as Brack. He petitioned for reinstatement of his right to own a gun, and took up target practice as Shen persisted with her wrongful death case. Defendant testified that Shen and Zhao were framing him, and he unconvincingly disputed the testimony of several prosecution witnesses who had no reason to testify untruthfully. One witness identified defendant in court as the shooter, and no witness excluded defendant as the assailant. Other witnesses testified that defendant was physically similar to the shooter, and described the shooter's distinctive hat, which was similar if not identical to the hat defendant commonly wore. Defendant exercised his right to testify, and the jury rejected his testimony. Even assuming some evidentiary error, reversal is not warranted on this record. (*Watson*, at p. 836; *Chapman*, at p. 24; *Partida*, *supra*, 37 Cal.4th at p. 439; *Riggs*, *supra*, 44 Cal.4th at p. 301.)

E. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

Defendant argues that the lying-in-wait special circumstance instruction was constitutionally flawed in this case because it failed to meaningfully distinguished the lying-in-wait special circumstance (§190.2, subd. (a)(15)) from lying-in-wait first degree murder (§187). Our Supreme Court has rejected defendant's contention (*People v.*

Streeter (2012) 54 Cal.4th 205, 252–253, citing *People v. Stevens* (2007) 41 Cal.4th 182, 203–204, *People v. Nakahara* (2003) 30 Cal.4th 705, 721, and *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148–1149), and we are bound by its decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The special circumstance narrowing function is realized because first-degree murder by lying-in-wait requires the intent to act, but not necessarily the intent to kill, while the special circumstance allegation requires the intent to kill. (*People v. Stevens, supra*, 41 Cal.4th at p. 204.)

Defendant’s effort to distinguish this case is unavailing. Here the prosecutor argued “[i]f you conclude that defendant is guilty of first-degree murder on the lying in wait theory, this special circumstance automatically follows, because as you look at the elements, they are the same.” Under the prosecution’s theory, the intentional act that established lying-in-wait first degree murder was the same intentional act that established the lying-in-wait special circumstance—the fatal shooting of Zhao. The fact-dependent convergence of elements in this case does not render the special circumstance constitutionally deficient.

F. RESTITUTION AND PAROLE REVOCATION FINE

Defendant identifies and the Attorney General concedes a \$50,000 math error in the court’s restitution calculation. The court calculated \$816,160 in Zhao’s future lost earnings over 16 years, and subtracted \$81,616 (10 percent which Zhao would have spent on herself) from that amount, intending to order \$734,544 in restitution to Zhao’s husband and son, but miscalculating the difference as \$784,544. From that difference, the court subtracted \$70,000 Zhao’s husband received from the Victim Compensation and Government Claims Board for lost wages. Accordingly, the June 26, 2012 sentencing minutes should be corrected to show \$664,544 in restitution to Zhao’s husband and son instead of \$714,544, and the abstract of judgment should be corrected to show the total restitution amount as \$751,950.95 (section 9.b–Restitution per PC 1202.4(f)), and \$664,544 in restitution to the husband and son (section 12.1).

The sentencing minutes and abstract of judgment also must be corrected to strike the \$1,000 suspended parole revocation fine. As the Attorney General concedes, the fine is inapplicable because it applies only to a sentence that includes a period of parole (§1202.45, subd. (a)), which is not the case here.

IV. DISPOSITION

The trial court shall correct the July 26, 2012 sentencing minutes to reflect \$664,544 in restitution to Zhao's husband and son instead of \$714,544, and to strike the \$1,000 parole revocation fine.

The trial court shall correct the abstract of judgment to show \$751,950.95 total restitution in section 9.b and \$664,544 restitution in section 12.1, and to strike the \$1,000 parole revocation fine from section 9.a.

As corrected, the judgment is affirmed.

Grover, J.

I CONCUR:

Bamattre-Manoukian, Acting P.J.

I CONCUR IN THE JUDGMENT ONLY:

Mihara, J.

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H038625